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Supreme Court of the United States.

OCTOBER TERM, 1968.

No. 601

ROBERT H. HOWIE, JR.,
Petitioner,
v.
COMMONWEALTH OF MASSACHUSETTS,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF MASSACHUSETTS.

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Robert H. Howie, Jr., petitioner, prays that a writ of certiorari issue to review the judgment of the Supreme Judicial Court of Massachusetts entered on June 5, 1968.

Opinion Below.

The opinion of the Supreme Judicial Court of Massachusetts is printed in Mass. Adv. Sh. (1968) 937-938 (Appendix A, *infra*, p. 12).

Jurisdiction.

The jurisdiction of the Court is invoked under 28 U.S.C. § 1257.

The petitioner submits this statement to show that the Supreme Court of the United States has jurisdiction of this petition, and that substantial Federal constitutional questions are presented.

Statute Involved.

Acts of 1967, c. 13: "The first paragraph of section 7 of chapter 90 of the General Laws is hereby amended by adding the following sentence:—Every person operating a motorcycle or riding as a passenger on a motorcycle or in a sidecar attached to a motorcycle shall wear protective head gear conforming with such minimum standards of construction and performance as the registrar may prescribe."

Statement of the Case.

An agreed statement of facts was entered into by the parties, part of which is as follows: that the petitioner did operate a motorcycle on a public way, on August 18, 1967, in Belmont, Commonwealth of Massachusetts, and, while so operating, he was not wearing any form of head gear.

A citation was issued by a police officer, and at the trial the petitioner filed a motion to dismiss, and in support of said motion submitted the following:

> "1. The offense charged in this complaint is in violation of the following provisions of the United States Constitution and the Constitution of the Commonwealth of Massachusetts.
>
> "A. The Ninth Amendment—in that it conflicts with the defendant's right of privacy.

"B. The Fourteenth Amendment—in that it conflicts with the defendant's right to be free from State deprivation of . . . . 'liberty . . . . without due process of law' and the defendant's right to 'equal protection of the laws.'

"C. Article I of the First Constitution of the Commonwealth of Massachusetts—in that it conflicts with the 'right of enjoying . . . . their Liberty . . . . seeking and obtaining' the defendant's 'safety and happiness.' "

The Court refused to grant the motion to dismiss.

The defendant was found guilty and appealed. The case came before the Supreme Judicial Court of Massachusetts in due course, and was decided on June 5, 1968. The Supreme Judicial Court upheld the statute in question, and its decision is set forth in Appendix A, *infra*. On September 3, 1968, Mr. Justice Marshall entered an order extending the time for filing a petition for a writ of certiorari in the above entitled cause to and including October 3, 1968.

Questions Presented.

The basic question is whether the Massachusetts statute, chapter 13 of the Acts of 1967, is repugnant to the Ninth Amendment and the Fourteenth Amendment to the Constitution of the United States, or involves any other denial of Federal right.

Reasons for Granting the Writ.

Petitioner asks that this Court grant certiorari in this case to review the question posed. It is of pressing public

importance, as many states have promulgated similar laws to the one in issue, and there have been varied decisions. This case presents to this Court an opportunity to clarify the question of constitutionality of such a statute, and to eliminate the confusion between the states in this regard. Consistency is to be desired and travel between states will be facilitated. Constitutional rights will be protected.

The Ninth Amendment

> "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

The Fourteenth Amendment

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; . . . nor deny to any person within its jurisdiction the equal protection of the laws."

"The Ninth Amendment in the Constitution is the counterpart of the 'general welfare' clause. It protects the individual in the same manner that the general welfare clause protects the public."

"The entire context of the Ninth Amendment, and its historic background, definitely prove that it was intended solely as a protection of our unenumerated personal rights as individuals as distinguished from our public or collective rights. This concept is necessary to maintain an even balance in the Constitution."

"The results which are sought to be accomplished have frequently been used to justify the means of accomplishment. Our individual liberties are in danger of being over-

whelmed by public necessities. The trend is now towards expediency, and our executives and administrative bodies, legislatures, and even our courts have been able to rationalize and justify almost any measure which the general public demands, under the theory that it is good for the general welfare and common good. This has in a large measure been to the disparagement of private rights and individual genius."

"Whenever we lose the distinction between individual liberty and the necessities of the general welfare, the virtue of our form of government is lost, and we have nothing but the worst form of tyranny. . . ."

All of the above quotations are from "The Forgotten Ninth Amendment," by Bennett B. Patterson (1955).

"Under [the police power] there is no unrestricted authority to accomplish whatever the public may presently desire."

Panhandle Eastern Pipe Line Co. v. *State Highway Commission*, 294 U.S. 613, 622 (1935).

"The legislature may not, . . . under the guise of protecting the public interest, interfere with private rights."

People v. *City of Chicago*, 413 Ill. 83, 108 N.E. 2d 16, 21 (1952).

If it should be argued in support of the statute in question that the loss of a part is a loss to the whole and that the protection by the state of an individual, even against his will, may be construed to be in the public interest, it should be pointed out that the purpose of our founding fathers in framing the United States and State Constitutions was to provide a safe environment in which states, corporations, families and individuals could be free to live and grow and

to enjoy their "unalienable rights . . . of seeking and obtaining their safety and happiness." Article I, Massachusetts Constitution. Certainly their purpose was not to mask the individual and individual rights behind an impersonal body called the State. Their desire to avoid an all-powerful state led to the adoption of the first eight amendments to the United States Constitution and led James Madison to reassert the individual's fundamental rights in the Ninth Amendment, the right to privacy.

"Since the right of the citizen to use his property as he chooses, so long as he harms nobody, is an inherent and constitutional right, the police power cannot be invoked for the abridgement of a particular use of private property, unless such use reasonably endangers or threatens the public health, the public safety, the public comfort or welfare. . . ."

Spann v. *Dallas,* 235 S.W. 513.

". . . any attempt to restrict those liberties must be justified by clear public interest, threatened not doubtfully or remotely, but by clear and present danger."

Thomas v. *Collins,* 323 U.S. 516, 530 (Rutledge, J.).

"In sum, the Ninth Amendment simply lends strong support to the view that the 'liberty' protected by the Fifth and Fourteenth Amendments from infringement by the Federal Government or the States is not restricted to rights specifically mentioned in the first eight amendments."

Griswold v. *Connecticut,* 381 U.S. 479, 493 (Goldberg, J.).

"The word 'liberty' contained in that amendment embraces not only the right of a person to be free from phys-

ical restraint, but the right to be free in the enjoyment of all his faculties as well." Fourteenth Amendment.

Grosjean v. *American Press Co.*, 297 U.S. 233, at p. 244.

It is an unconstitutional interference with private rights to require an individual, solely for his own safety and at his own expense, to take affirmative action (wearing a helmet), infringing on his enjoyment of his personal property while traveling on the public ways of the Commonwealth.

"There is, of course, a sphere within which the individual may assert the supremacy of his own will and rightfully dispute the authority of any human government, especially of any free government existing under a written constitution, to interfere with the exercise of that will."

Jacobson v. *Massachusetts*, 197 U.S. 11, 29 (1905) (dictum of the Court).

Police Power.

Police power includes the power to enact laws within constitutional limits to promote public safety, public health, morality, peace and quiet, law and order, community well-being and tranquillity, but from its nature it is incapable of exact definition.

Berman v. *Parker*, 348 U.S. 26 (1954).
Kovacs v. *Cooper*, 336 U.S. 77 (1949).
New Orleans Gas Co. v. *Louisiana Light Co.*, 115 U.S. 650 (1885).

A distinction should be emphasized between regulations imposed on a particular operator for the benefit of operators and regulations imposed on a manufacturer of motor

vehicles with regard to equipment and the present type of regulation, which is aimed at and will affect only the particular user's enjoyment of his own property.

"If, therefore, a statute purporting to have been enacted to protect the public health, the public morals, or the public safety has no real or substantial relation to those objects, it is a palpable invasion of rights secured by the fundamental law, and it is the duty of the courts to so adjudge, and thereby give effect to the Constitution."

Gaines & Co. v. *Holmes,* 154 Ga. 344, 355.

"It does not at all follow that every statute enacted ostensibly for the promotion of these ends, is to be accepted as a legitimate exertion of the police powers of the State. There are, of necessity, limits beyond which legislation cannot rightfully go. . . . the courts must obey the Constitution rather than the law-making department of government, and must, upon their own responsibility, determine whether, in any particular case, these limits have been passed."

". . . the State, when providing, by legislation, for the protection of the public health, the public morals, or the public safety, is subject to the paramount authority of the Constitution of the United States, and may not violate rights secured or guaranteed by that instrument, or interfere with the execution of the powers confided to the general government."

"The courts are not bound by mere forms, nor are they to be misled by mere pretences. They are at liberty—indeed, are under a solemn duty—to look at the substance of things, whenever they enter upon the inquiry whether the legislature has transcended the limits of its authority."

Mugler v. *Kansas,* 123 U.S. 623, 661, 663.

"To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained? The distinction between a government with limited and unlimited powers is abolished, if those limits do not confine the persons on whom they are imposed, and if acts prohibited and acts allowed, are of equal obligation."

Marbury v. *Madison*, 1 Cranch 137, 176-177.

While it is true that a proper exercise of police power may involve limitation of the use and enjoyment of private property without violation of the due process clause of the Constitution, the police power must be exercised for the "general" welfare, the "common" good, the "public" health, safety or morals.

Legislation against a Class.

A classification against the motorcyclist has been made by the Legislature which can be shown to be essentially arbitrary and therefore illegal. The operator of a motorcycle thus is denied the same rights and privileges as the operators of other road vehicles.

There is no reasonable basis for the assumption that a helmet will benefit the operator of a motorcycle to a greater degree than a helmet might benefit the operator of an automobile or a truck. The Legislature's decision to classify and regulate motorcycle operators was unreasonable and arbitrary, and the statute is therefore unconstitutional.

"Restrictions upon the use of property by its owner cannot be purely arbitrary. They must be in some degree necessary to protect the legitimate interests of others."

Janesville v. *Carpenter*, 77 Wis. 288.

"The protection guaranteed by the [Fourth and Fifth] Amendments is much broader in scope. The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the Government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men."

Olmstead v. *United States,* 277 U.S. 438, 478 (Brandeis, J., dissenting).

The individual's inalienable rights of "seeking and obtaining their safety and happiness" have been abridged by the statute in question, and the burden placed upon him is oppressive. He is compelled to purchase, at his own expense, what is essentially an article of personal apparel, merely so he can use his own personal property. When he arrives at his destination, he must carry his helmet with him, since he cannot lock it up or leave it on the handle bars. To many people helmets are uncomfortable, irritating and distracting. They tend to decrease operator efficiency and reduce hearing ability, as well as to limit lateral vision. If the operator of a motorcycle feels he may be in less danger of collision or upset by failing to wear a helmet under the statute, he is not free to exercise his judgment in this respect. Wearing a helmet does nothing to prevent the accident itself; it seeks only to lessen the consequences and, indeed, could increase the possibility of an accident.

It is not constitutionally permissible for the Legislature, on the pretense of regulating the use of highways, to regulate in fact the user's private rights which are unaffected with a public interest. Hence it is not a proper exercise of the police power of the state which does not include the right to regulate one's conduct solely for his own protection, and is therefore unconstitutional.

"Liberty has never come from the government. . . . The history of liberty is the history of the limitation of governmental power, not the increase of it." Woodrow Wilson.

The validity of the statute is assailed as violating the Federal Constitution in that it is in contravention of the Ninth Amendment and of the due process clause contained in the Fourteenth Amendment. It denies the petitioner the equal protection of the laws and abridges his freedom.

Conclusion.

For the foregoing reasons, petitioner respectfully requests this Honorable Court to grant this petition for a writ of certiorari.

Respectfully submitted,

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[Appendix follows.]

Appendix A.

COMMONWEALTH *vs.* ROBERT H. HOWIE, JR.

[Rescript Opinion.]

The defendant appeals from a finding of guilty of violating G. L. c. 90, § 7, for not wearing protective headgear while operating a motorcycle. Upon appeal from a finding in the District Court the case was heard by a judge sitting without jury in the Third District Court of Eastern Middlesex under St. 1964, c. 628. The defendant filed a written motion to dismiss which was denied, and he was again found guilty. The defendant excepts to the denial of his motion to dismiss. There was no error. General Laws c. 90, § 7, requires every person operating or riding a motorcycle to wear protective headgear conforming with certain minimum standards. It lies within the power of the Legislature to adopt reasonable measures for the promotion of safety upon public ways in the interests of motorcyclists and others who may use them. *Commonwealth* v. *Boston & Maine Transp. Co.* 282 Mass. 345, 348. The act of the Legislature bears a real and substantial relation to the public health and general welfare and is thus a valid exercise of the police power. *Coffee-Rich, Inc.* v. *Commissioner of Pub. Health,* 348 Mass. 414, 422. As contended by the Commonwealth, "[t]he legislation is reasonable, applies to all equally, and is directly related to highway safety." See *Hall-Omar Baking Co.* v. *Commissioner of Labor & Indus.* 344 Mass. 695, 700. A recent Michigan decision to the contrary is not persuasive. On this general subject we find ourselves in agreement with *Colvin* v. *Lombardi,* R.I. ,[a] decided May 8, 1968.

Exceptions overruled.

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[a] (May 28, 1968) 36 U. S. L. Week 2732.